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5-22-72

ANNOTATIONS REGARDING SECURITY MATTERS MADE BY WM. G. FLORENCE UPDATED, 6 JAN 73

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY JOSEPH RUSSO,JR., et al.,

Defendants.

No. 9373-MMB-CD

TRIAL MEMORANDUM

[18 U.S.C. §371: Conspiracy;
18 U.S.C. §641: Stealing Government Property; Concealing Stolen Government Property; Unauthorized Conveying of Government Property; Receiving Stolen Government Property;
18 U.S.C. §793(c): Receiving National Defense Documents;
18 U.S.C. §793(d)(e): Communicating National Defense Documents;
18 U.S.C. §793(e): Retaining National Defense Documents.]

Plaintiff, United States of America, submits herewith a Trial Memorandum.

Respectfully submitted,

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I

STATUS OF THE CASE

A. Trial is set for an unspecified date in June, 1972, before the Honorable Wm. Matthew Byrne, Jr., United States District Judge.

B. Both defendants are at liberty on bond.

C. Jury has not been waived.

D. Estimated duration of trial is four weeks.

E. The indictment is in 15 Counts as follows:

COUNT	OFFENSE	DEFENDANT
One	Conspiracy.	Russo and Ellsberg
Two	Stealing Government Property.	Ellsberg
Three	Retaining Government Property.	Ellsberg
Four	Conveying Government Property.	Ellsberg
Five	Conveying Government Property.	Ellsberg
Six	Conveying Government Property.	Ellsberg
Seven	Receiving Government Property.	Russo
Eight	Obtaining National Defense Documents.	Ellsberg
Nine	Obtaining National Defense Documents.	Ellsberg
Ten	Receiving National Defense Documents.	Russo
Eleven	Communicating National Defense Documents.	Ellsberg
Twelve	Communicating National Defense Documents.	Ellsberg
Thirteen	Communicating National Defense Documents.	Ellsberg
Fourteen	Retaining National Defense Documents.	Ellsberg
Fifteen	Retaining National Defense Documents.	Russo

II

STATUTES AND RULES INVOLVED

A. STATUTES

Title 18, United States Code, Section 371, provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, United States Code, Section 641, provides:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--

THE DIFFERENCE BETWEEN "INFORMATION" AND PHYSICAL PROPERTY MUST BE CONSIDERED

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

Title 18, United States Code, Section 6, provides:

"The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

"The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

Title 18, United States Code, Section 793(c-e), provides:

"(c) Whoever, for the purpose aforesaid [i.e., for the purpose of obtaining information respecting the national defense], receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with

the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

"(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

"(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully

WHAT NATIONAL DEFENSE? PAST? OR ACTIVE?

DOCUMENT AND INFORMATION MUST BE INTERCHANGEABLE FOR ESPIONAGE OR "TREASON" PURPOSES, OR THE LAW MAKES NO SENSE.

"REASON TO BELIEVE" CANNOT BE DETERMINED BY DISCREDITED CLASSIFICATION MARKS.

INSTEAD OF "REASON TO BELIEVE INJURY" THERE WAS REASON TO BELIEVE THE U.S. WOULD BE HELPED.

NO ACTIVE DEFENSE RELATIONSHIP

I HAD R. to B. THE CONTRARY

SAME COMMENT AS FOR (d) — PLUS FACT THAT "POSSESSION" WAS AUTHORIZED.

communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . ."

FIRST SENTENCE OF ORDER STATES --- "ESSENTIAL" THAT CITIZENS BE INFORMED ---- [IT IS PERTINENT]

B. ORDERS AND REGULATIONS

Executive Order 10501, dated November 5, 1953, 3 CFR 979-986 (1953), as amended, states in pertinent part as follows:

"WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

"WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

"NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows.

* * *

"Sec. 2. Classification. * * *

(b) Physically Connected Documents.

The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document

HISTORICAL INFO CANNOT PRESERVE THE ABILITY, ETC.

THIS IS PREDICATED ON THERE BEING SOME "CLASSIFIED ITEMS IN THE DOCUMENTATION. THIS IS MERELY A MARKING INSTRUCTION. IT HAS NOTHING TO DO WITH CLASSIFICATION EVALUATION UNDER SEC. 1.

NOWHERE IN THESE PAGES IS THERE ANY REFERENCE TO PRESCRIBED RESTRICTIONS ON USE OF CLASSIFICATION MARKINGS, SUCH AS ARE IN SEC. 1 OF EO 10501 AND PARA III. A.3. DOD INSTR 5210.47.

therein. * * *"

* * *

"Sec. 5. Marking of Classified Material.

After a determination of the proper defense classification to be assigned has been made in accordance with the provisions of this order, the classified material shall be marked as follows:

* * *

"(b) Unbound Documents. The assigned defense classification on unbound documents, such as letters, memoranda, reports, telegrams, and other similar documents, the pages of which are not permanently and securely fastened together, shall be conspicuously marked or stamped at the top and bottom of each page, in such manner that the marking will be clearly visible when the pages are clipped or stapled together."

* * *

"(i) Material Furnished Persons Not in the Executive Branch of the Government. When classified material affecting the national defense is furnished authorized persons, in or out of Federal service, other than those in the executive branch, the following notation, in addition to the assigned classification marking, shall whenever practicable be placed on the material, on its container, or on the written notification of its assigned classification:

"This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U.S.C., Secs. 793 and 794, the transmission or revelation of which in any manner to an unauthorized person

AGAIN, THIS IS STRICTLY A MARKING PROCEDURE. PLACEMENT OF MARKS DOES NOT MEAN THAT THE INFO HAS ANY DEFENSE VALUE.

THIS, TOO, IS ONLY A MARKING PROCEDURE. PEOPLE PUT IT ON UNCLASSIFIED INFORMATION AS WELL AS CLASSIFIED!!

is prohibited by law." [THIS IS NOT SUPPORTED BY LAW OR ANY D.O.D. PRACTICE.]

* * *

"Sec. 6. Custody and Safekeeping. The possession or use of classified defense information or material shall be limited to locations where facilities for secure storage or protection thereof are available by means of which unauthorized persons are prevented from gaining access thereto." HA

* * *

"(e) Custodian's Responsibilities. Custodians of classified defense material shall be responsible for providing the best possible protection and accountability for such material at all times and particularly for securely locking classified material in approved safekeeping equipment whenever it is not in use or under direct supervision of authorized employees. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified defense information or material by sight or sound, and classified information shall not be discussed with or in the presence of unauthorized persons."

* * *

"Sec. 7. Accountability and Dissemination. Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy. Proper control of dissemination of classified defense information shall be maintained at all times . . . ."

* * *

SEE WGF MEMO 5 MAR 72 ON "AUTHORIZED" POSSESSION.

AS AN EXEC. ORDER TO HEADS OF EXEC. BRANCH AGENCIES, NONE OF THE CITED INSTRUCTIONS APPLY TO ELLSBERG, RUSSO, OR ANYONE ELSE OUTSIDE THE EXEC. BRANCH.

SEE COMMENT, BOTTOM OF PAGE 6.

Department of Defense Instruction No. 5210.47, Security Classification of Official Information, December 31, 1964, as amended, provides in pertinent part:

"Section V. AUTHORITY TO CLASSIFY.

A. Original Classification

"1. Original classification is involved when -

"a. An item of information is developed which intrinsically requires classification and such classification cannot reasonably be derived from a previous classification still in force involving in substance the same or closely related information; or

"b. An accumulation or aggregation of items of information, regardless of the classification (or lack of classification) of the individual items, collectively requires a separate and distinct classification determination.

"2. For the purpose of assuring both positive management control of classification determinations and ability to meet local operational requirements in an orderly and expeditious manner, the Assistant Secretary of Defense (Manpower) will exercise control over the granting and exercise of authority for original classification of official information. Pursuant thereto, such authority must be exercised only by those individuals who at any given time are the incumbents of those offices and positions designated in or pursuant to subparagraph 3 below and Appendix C, including the officials who are specifically designated

THIS ONLY DISTINGUISHES BETWEEN AN "ORIGINALLY" ASSIGNED CLASSIFICATION AND A CLASSIFICATION MARK PLACED ON A REPRODUCTION OF INFO ALREADY CLASSIFIED.

THIS ONLY REFLECTS RESPONSIBILITY UNDER EO 10501 FOR DESIGNATING PERSONS TO CLASSIFY INFO AS SECRET. IT HAS NO RELATIONSHIP TO T/S VALIDITY OF ANY CLASSIFICATION. ACTION!

* NOTHING WARRANTS A CLASSIFICATION EXCEPT AS SPECIFIED BY THE EXEC. ORDER.

■ A COMPILATION OF ZERO CLASSIFICATION PLUS ZERO CLASSIFICATION CANNOT ITSELF ADD UP TO A CLASSIFICATION OF T/S, SECRET OR CONFIDENTIAL.

NOTE: 1972 DOD REG ELIMINATED THE ERROR IN B.

to act in the absence of the incumbents. The following general principles are applicable:

"a. Appendix C designates specifically the officials who may exercise original TOP SECRET or SECRET classification authority and who among them may make additional designations. All such additional designations shall be specific and in writing.

"b. The authority to classify is personal to the holder of the authority. It shall not be exercised for him or in his name by anyone else, nor shall it be delegated for exercise by any substitute or subordinate." (p. 10)

* * *

"B. Derivative Classification

1. Derivative classification is involved when --

"a. An item of information or collection of items is in substance the same as or closely related to other information with respect to which there is an outstanding proper classification determination of which the derivative classifier has knowledge and on which he is relying as his basis for classification; or

"b. The information is created as a result of, in connection with, or in response to, other information dealing in substance with the same or closely related subject matter which has been and still is properly classified; or

THIS PERMISSIVENESS FOR A PERSON TO CLASSIFY WHAT HE CONSIDERED TO BE SOMETHING CLOSELY RELATED TO AN ITEM ALREADY CLASSIFIED LED TO DOD HUNDREDS OF THOUSANDS OF PEOPLE IN EXERCIZING CLASSIFICATION AUTHORITY.

[NOTE: DoD ELIMINATED THE PRACTICE IN 1972.]

IF THE ITEM IS THE SAME AS ONE ALREADY CLASSIFIED, ALL THAT IS INVOLVED IN MARKING IS AS SPECIFIED IN 3 ON PAGE 11. --

"& " IS THE "CLOSELY RELATED" CONCEPT IN DIFFERENT WORDS.

ICE-9

One initial mistake — e.g.

"c. The classification to be applied to the information has been determined by a higher authority and that classification determination is communicated to and acted upon by the derivative classifier.

"DERIVATIVE" IS A MISNOMER IN THAT THE PERSON IS MERELY PUTTING A MARK ON SOMETHING UNDER A SPECIFIC ORDER TO DO IT.

"2. Derivative classification is the responsibility of each person whose official duties require decision by him as to whether information contained in or revealed by material he prepares or produces requires classification under the circumstances stated in subparagraph 1, above, subject to the following general rules:

THIS SAYS IF A PERSON DECIDES SOMETHING HE IS RESPONSIBLE FOR THE DECISION.

"a. In the case of a document, the commander, supervisor, or other official whose signature or other form of approval is required before the document may be issued, transmitted or referred outside the office of origin, is responsible for the necessity, currency and accuracy of the derivative classification assigned to that document."

A SIGNER OF A DOCUMENT IS ALWAYS RESPONSIBLE FOR THE VALIDITY OF THE CLASSIFICATION MARKING.

* * *

"3. In those situations involving the copying or extracting of classified information from another document, or involving the reproduction or translation of a whole classified document, the individual responsible for such copying, extracting, reproduction, or translation shall be responsible for assuring that the new document or copy bears the same classification as that assigned to the information or document from which the new document or copy was prepared. Questions on the propriety

IF A PERSON REPRODUCES CLASSIFIED INFORMATION HE MARKS THE REPRODUCTION AS SECRET.

of current classification should be resolved as indicated in paragraph VII, G." (pp. 12-13)

* * *

"APPENDIX C

ORIGINAL CLASSIFICATION AUTHORITY
(See paragraph V, A.)

"Part I. Original TOP SECRET Classification Authority

* * *

"5. The Chairman, Joint Chiefs of Staff; the Director, Joint Staff; the Secretary, Joint Chiefs of Staff; the Directors and Deputy Directors of the subordinate agencies of the Organization of the Joint Chiefs of Staff, as designated by the Chairman, Joint Chiefs of Staff; the commanders and deputy commanders of the unified and specified commands and the Chiefs of Staff of those commands."

SO, WHAT 2 SMALL DOD PEOPLE ARE, ONLY A FRACTION OF AS CLASSIFYING MAYBE 1/10TH. THESE T.S.

Department of Defense regulations, 32 CFR Part 155, Industrial Personnel Security Clearance Program, promulgated under the authority of Executive Order 10501, provide in part as follows:

§155.1 Purpose

* * *

". . . this part establishes the standard and criteria for making security clearance determinations when persons employed in private industry require access to classified defense information.

* * *

"SECURITY CLEARANCE" IS NOT IN LAW, IT IS NOT IN E.O. 10501, EXCEPT FOR CHANGING STATE COMBINATIONS

§155.2 Definitions.

* * *

"(i) Security clearance or clearance: An authorization for a contractor or person employed by a contractor to have access to specified levels of classified defense information provided his duties so require."

* * *

The Industrial Security Manual for Safeguarding Classified Information, issued to implement the Department of Defense Industrial Security Program under Department of Defense Directive 5220.22 provided in pertinent part as follows:

"FOREWARD

* * *

3. In order to implement Executive Order 10865, the phrase 'personnel security clearance' shall have the following meaning: 'access authorization'."

* * *

"SECTION I. GENERAL

* * *

3. DEFINITIONS

* * *

"c. Authorized Persons. Those persons who have a need-to-know for the classified information involved, and have been cleared for the receipt of such information . . .."

* * *

"e. Classified Information. Official information, including foreign classified information, which requires protection in the interest of

THIS IS MISREPRESENTATION OF "OFFICIAL DUTIES AND TRUSTWORTHY" POLICY IN SEC. 7, EO 10501.

ISM

ISM

ISM: NOTHING IN THE ISM APPLIED TO ELLSBERG'S CONTRACT AS PART OF THE RAND CONTRACT. IT APPLIED TO RAND PRESIDENT. THUS RULES APPLIED TO ELLSBERG.

SEE WGF MEMO OF 5 MAR 72

NOTE: THE DOD-HENDERSON-13-LETTER SUPERSEDED THE ISM AT RAND FOR VIETNAM STUDY (NOT JCS AND GURTOV).

national defense and which has been so designated by appropriate authority."

* * *

"am. Need-To-Know. A determination made by the possessor of classified information that a prospective recipient, in the interest of national defense, has a requirement for access to (see paragraph a above), knowledge of, or possession of the classified information in order to perform tasks or services essential to the fulfillment of a classified contract or program approved by a User Agency."

* * *

"ap. Official Information. Information which is owned by, produced by or is subject to the control of the United States Government."

* * *

"ar. Permanently Bound Documents. Permanently bound books or pamphlets, the pages of which are permanently and securely fastened together in such a manner that one or more pages cannot be extracted without defacement or alteration of the book or pamphlet. No document shall be considered a permanently bound document unless it is sewed and has the glued binding which is common to the art of bookbinding. (This eliminates documents fastened only with staples, brads, or other commercial paper fasteners.)"

* * *

"bd. Unauthorized Person. Any person not authorized to have access to specific classified

A DISTORTION OF THE "REQUIREMENT-TO-DISCLOSE" POLICY IN SEC. 7, E.O. 10501.

NOT IN EO 10501.

ISM: NONE OF THIS APPLIED TO ELLSBERG.

SEE WGF MEMO, MARCH 72

ELLSBERG WAS AN "AUTHORIZED PERSON."

-14-

SEE WGF MEMO OF GAUG 72 RE RUSSO.

information in accordance with the provisions of this Manual."

* * *

5. GENERAL REQUIREMENTS

* * *

"b. Limitation on Disclosure. [The Contractor] Shall assure that classified information is furnished or disclosed only to authorized persons . . . ."

* * *

"SECTION II. HANDLING OF CLASSIFIED INFORMATION

* * *

13. SPECIAL REQUIREMENTS FOR TOP SECRET

* * *

"h. TOP SECRET material shall be reproduced only with the prior written authorization of the contracting officer . . . .

"i. Transmission of TOP SECRET material outside of the facility requires the written authorization of the contracting officer . . . .

* * *

18. REPRODUCTION

"a. Reproduction by Authorization Only. The contractor shall not make, nor permit to be made without prior written authorization of the contracting officer, or his designated representative, any photograph or other reproduction of TOP SECRET information . . . ."

"SECTION III. SECURITY CLEARANCES

* * *

THIS WAS A CONTRACTUAL AGREEMENT BETWEEN EXEC. BRANCH AND RAND, NOT ELLSBERG!

"20. GENERAL

"a. An individual shall be permitted to have access to classified information only when cleared by the Government or by the contractor as specified in this Section; and when the contractor determines that access is necessary in the performance of tasks or services essential to the fulfillment of a contract or program, i.e., the individual has a need-to-know . . ..

* * *

"1. Foreign nationals are not eligible for a personnel security clearance, except that reciprocal clearances may be granted to citizens of Canada and the United Kingdom in accordance with paragraph 29."

THIS DID NOT APPLY TO ELLSBERG.

NOTE: THE EXEC. BRANCH DISCLOSES CLASSIFIED INFORMATION TO THOUSANDS OF FOREIGN NATIONALS ON A CONTINUING BASIS.

III

STATEMENT OF FACTS

The Government expects to prove each material allegation of the indictment. The facts are as follows:

Anthony Russo and Daniel Ellsberg were both employed by the Rand Corporation, Santa Monica, California. The Rand Corporation was engaged in research work for agencies of the Department of Defense. In that connection Rand was furnished the use of classified Government documents which were required to be safeguarded by Rand according to the provisions of the Industrial Security Manual issued by the Department of Defense. THE DOD-HENDERSON AGREEMENT IS A FACTOR.

The Industrial Security Manual restricted access to classified information to "authorized persons" who possessed a security clearance and had a need to know theinformation. The Manual

ISM DID NOT APPLY TO ELLSBERG.

RAND'S "OBLIGATIONS" COULD NOT BE IMPOSED ON EMPLOYEES. RAND COULD ONLY IMPOSE ITS OWN RULES ON THEM.

forbade disclosure of classified information to unauthorized persons. The Manual also provided that "top secret" material could be reproduced or transmitted outside of the Rand facility only with the written authorization of the Government's contracting officer.

In order to implement the requirements of the Industrial Security Manual, Rand issued its own Security Manual imposing the necessary security obligations upon its employees and making these requirements a condition of continued employment. This manual forbade disclosure of classified material to anyone lacking a security clearance and a need-to-know. It also required written authorization for reproduction of top secret material and provided that classified material could not be taken home.

Both Russo and Ellsberg signed memos attesting that they had read the Rand Security Manual and understood the safeguards they must apply to protect classified information. As a condition of employment, both Russo and Ellsberg signed a "security acknowledgement," stating that they would safeguard classified information and understood the criminal penalties for disclosure to unauthorized persons. Both Russo and Ellsberg acknowledged receiving a security briefing and agreed in writing to execute at the end of their employment a "security termination statement" stating that they had not retained any classified materials and would not disclose classified information.

(SECURITY BRIEFING AND TERM. STATEM'T)

FALSE

THESE WERE NOT CONTRACTS BETWEEN ANY PARTIES.

On January 21, 1969, the Office of the Assistant Secretary of Defense, International Security Affairs, transmitted to Rand's Washington, D. C. office, a 38-Volume Top Secret Department of Defense study entitled "United States - Vietnam Relations, 1945-1967."

AUTHORIZATION FOR POSSESSION HAD ALREADY BEEN GIVEN.

On March 3, 1969, under a Rand designation as a courier between Rand Washington and Rand Santa Monica, Ellsberg obtained (WAS GIVEN) ten volumes of the Study from Rand's Washington Office. On (THE PREVIOUS AUTHORIZATION) August 28, 1969, under a similar designation, Ellsberg obtained (WAS GIVEN)

PROSECUTION ERROR: MEMO SAYS MAY BE PUNISHABLE UNDER LAW! DSA FOR No. 482

RAND COULD ONLY "FIRE" THEM.

eight additional Study volumes. In direct violation of the Industrial Security Manual and the Rand Security Manual, Ellsberg failed to deliver the 18 Study volumes to Rand Santa Monica's Top Secret Control Officer, and they were not received by Rand until May 20, 1970.

On April 7, 1969, Ellsberg checked out from Rand's Top Secret Control Officer volume II of a top secret document authored by Melvin Gurtov entitled "Negotiations and Vietnam: A Case Study of the 1954 Geneva Conference." Ellsberg returned this document on May 20, 1970. On October 3, 1969, Ellsberg checked out from Rand's Top Secret Control Officer eight pages of a top secret report by General Wheeler to President Johnson. Ellsberg returned the Wheeler Report on October 17, 1969.

During 1969, Russo and Ellsberg asked Lynda Sinay, Russo's girlfriend, for the use of the xerox machine at her advertising office and she agreed. Ellsberg said he had material to copy which came from the vault in his office at Rand and related to the Vietnam War. Ellsberg said he was thinking of leaving Rand and wanted to take copies with him. He also said that Senator Fulbright wanted to see them.

On several occasions over a period of time, Sinay's office was used for such xeroxing. Ellsberg brought the documents in and took them and the copies out. Russo, Ellsberg, Sinay and Ellsberg's son, Robert, participated in the xeroxing. Ellsberg's girlfriend, Kimberly Rosenberg, was also present as was Vu Van Thai. Ellsberg's children and Lynda Sinay cut "top secret" security classification markings from the xerox copies at Ellsberg's request. Ellsberg paid Sinay for the use of her copy machine.

Examination of the Study volumes, Wheeler Report, and Gurtov document reveals that various of them bear latent fingerprints of Ellsberg, Russo, Sinay, Thai, and Robert Ellsberg. None but Ellsberg was authorized to have access to the documents.

[NOT COVERED BY ANY LAW]

(DID NOT APPLY TO ELLSBERG) (ROWEN'S INSTRUCTIONS APPLIED TO VIETNAM STUDY)

FALSE! THE DoD HENDERSON AGREEMENT GOVERNED.

[NO VIOLATION OF ANY LAW] NO EVIL HERE

← ELLSBERG AUTHORIZED THE "ACCESS."

(SIGNIFICANT IN THAT THE INDICTMENT SAYS "UNAUTHORIZED")

V

PERTINENT LAW

A. CONSPIRACY VIOLATIONS

1. Conspiracy to Defraud the United States.

a. Conspiracy to defraud the United States covers any conspiracy to impair, obstruct or defeat the lawful function of any department of Government.

In Dennis v. United States, 384 U.S. 855 (1966), a conspiracy fraudulently to obtain the services of the NLRB on behalf of a union was held violative of 18 U.S.C. §371's prohibition of conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." The Court said:

> "It has long been established that this statutory language is not confined to fraud as that term has been defined in the common law. It reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government,' Haas v. Henkel, 216 U.S. 462, 479, quoted in United States v. Johnson, 383 U.S. 169, 172. See also, Lutwak v. United States, 344 U.S. 604; Glasser v. United States, 315 U.S. 60, 66; Hammerschmidt v. United States, 265 U.S. 182, 188. Cf. Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405, 414-441, 455-458 (1959). In the present case, it is alleged that petitioners, unable to secure for their union the benefit of Labor Board process except by submitting non-Communist affidavits, coldly and deliberately concocted a fraudulent scheme; and in furtherance of that scheme, some of the petitioners did in fact submit false affidavits and the union did thereafter use

the Labor Board facilities made available to them. This Court's decisions foreclose the argument that these allegations do not properly charge a conspiracy to defraud the United States." [p. 861]

In United States v. Johnson, 383 U.S. 169-172, an allegation that the defendants conspired to defraud the United States by influencing the Department of Justice was upheld although they were not charged with any false statement, misrepresentation or deceit. The Court said: "18 U.S.C. §371 has long been held to encompass not only conspiracies that might involve loss of government funds, but also 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government.' Haas v. Henkel, 216 U.S. 462, 479."

In Haas v. Henkel, 216 U.S. 462 (1910), an indictment charged that Haas and Price conspired to obtain from Holmes, an employee of the Agriculture Department's Bureau of Statistics, advance information on the contents of official crop reports. The Court found that the indictment charged an offense. It said:

> " . . .[T]he conspiracy was to obtain such information from Holmes in advance of general publicity and to use such information in speculating upon the cotton market, and thereby defraud the United States by defeating, obstructing and impairing it in the exercise of its governmental function in the regular and official duty of publicly promulgating fair, impartial and accurate reports concerning the cotton crop. [p. 478] * * *
>
> "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government. * * * [I]t must

follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation."

[pp. 479-480]

See also Curley v. United States, 130 Fed. 1 (1st Cir. 1934), cert. den. 195 U.S. 628 (1904); United States v. Bradford, 148 Fed. 413, 421-22 (E.D. La. 1905), aff'd. 152 Fed. 616 (5th Cir. 1906), cert. den. 206 U.S. 563 (1907); United States v. Robbins, 157 Fed. 999 (D. Utah 1907); United States v. Morse, 161 Fed. 429, 435-36 (S.D. N.Y. 1908), aff'd. 174 Fed. 539 (2d Cir. 1909); United States v. Slater, 278 Fed. 266 (E.D. Pa. 1922); Langer v. United States, 76 F.2d 817 (8th Cir. 1935); Harney v. United States, 306 F.2d 523 (1st Cir. 1962); United States v. Vasquez, 319 U.S. 381 (3rd Cir. 1963); United States v. Moore, 173 Fed. 122 (D. Ore. 1909); United States v. Bonanno, 177 F.Supp. 106 (S.D. N.Y. 1959), rev'd. on other grounds 258 F.2d 408 (2d Cir. 1960).

b. Alleged defects in performance of a governmental function are no defense to a charge of conspiracy to defraud the United States by impairing such function.

In Dennis v. United States, 384 U.S. 855 (1966), an effort was made to raise as a defense a claim that the statutory scheme the defendants sought to impair was constitutionally defective. The Court held:

"We need not reach this question, for petitioners are in no position to attack the constitutionality of

§9(h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it -- a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction. [p. 865]

"It is no defense to a charge based upon this sort of enterprise that the statutory scheme sought to be evaded is somehow defective. Ample opportunities exist in this country to seek and obtain judicial protection. There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they now seek to challenge. This is the teaching of the cases. [p. 866] (emphasis added)

"In Kay v. United States, 303 U.S. 1, this Court upheld a conviction for making false statements in connection with the Home Owners' Loan Act of 1933, without passing upon the claim that the Act was invalid. The Court said, 'When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional

sanction.' 303 U.S., at 6. See also United States v. Kapp, 302 U.S. 214, involving a false claim for money under the subsequently invalidated Agricultural Adjustment Act of 1933. Analogous are those cases in which prosecutions for perjury have been permitted despite the fact that the trial at which the false testimony was elicited was upon an indictment stating no federal offense (United States v. Williams, 341 U.S. 58, 65-69); that the testimony was before a grand jury alleged to have been tainted by governmental misconduct (United States v. Remington, 208 F.2d 567, 569 (C.A. 2d Cir. 1953), cert. denied, 347 U.S. 913); or that the defendant testified without having been advised of his constitutional rights (United States v. Winter, 348 F.2d 204, 208-210 (C.A. 2d Cir. 1965), cert. denied, 382 U.S. 955, and cases cited therein). [p. 866]

"Petitioners seek to distinguish these cases on the ground that in the present case the constitutional challenge is to the propriety of the very question--Communist Party membership and affiliation--which petitioners are accused of answering falsely. We regard this distinction as without force. The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional. [p. 867]

"It is argued in dissent, see pp. 876-880, post, that we cannot avoid passing upon petitioners' constitutional claim because it bears upon whether they may be charged with defrauding the Government of a 'lawful function.' At the time of some of the allegedly fraudulent acts of the conspirators, This Court's decision in Douds had been handed down. It was flouted, not overlooked. This position loses sight of the distinction between appropriate and inappropriate ways to challenge acts of government thought to be unconstitutional. Moreover, this view assumes that for purposes of §371, a governmental function may be said to be 'unlawful' even though it is required by statute and carries the fresh imprimatur of this Court. Such a function is not immune to judicial challenge. But, in circumstances like those before us, it may not be circumvented by a course of fraud and falsehood, with the constitutional attack being held for use only if the conspirators are discovered." [p. 867]

Since even the constitutionality of a statute cannot be challenged by those prosecuted for conspiring to impair its operation, certainly defendants charged with conspiring to impair a governmental function are not permitted to claim that such function was being incorrectly carried out. Defendants charged with impairing the governmental function of controlling the dissemination of classified government materials cannot defend themselves by claiming that the materials were not correctly classified. This would permit defendants now to challenge rules regarding the dissemination of classified material which they have been indicted for previously conspiring to circumvent.

THERE IS NO SPECIFIED GOVT FUNCTION OF CONTROLLING CLASSIFIED INFORMATION

ANYWAY, THE PRESIDENT'S RULES APPLY ONLY TO CORRECTLY CLASSIFIED INFO (SEC. 1, E.O. 10501). FURTHERMORE, NO EXEC. ORDER APPLIED TO ELLSBERG-RUSSO.

A similar situation was faced in Scarbeck v. United States, 317 F.2d 546, 560 (D.C. Cir. 1963), in which the defendant was convicted of communicating classified Government documents to foreign agents in violation of 50 U.S.C. §783(b). The defendant attempted to assert that the documents were not properly classified. The Court held: THERE IS NO RELATIONSHIP BETWEEN THIS LAW AND THE NON-LAW THE PROSECUTION IS TRYING TO IMPOSE.

> "[A]ppellant is urging that after such an employee has obtained and delivered a classified document to an agent of a foreign power, knowing the document to be classified, he can present proof that his superior officer had no justification for classifying the document, and can obtain an instruction from the court to the jury that one of their duties is to determine whether the document, admittedly classified, was of such a nature that the superior was justified in classifying it. The trial of the employee would be converted into a trial of the superior. The Government might well be compelled either to withdraw the prosecution or to reveal policies and information going far beyond the scope of the classified documents transferred by the employee. The embarrassments and hazards of such a proceeding could soon render Section 783(b) an entirely useless statute. (emphasis added)
>
> "[7] We conclude that it is the intent of the statute to make the superior's classification binding on the employee. In this case, if the Government's evidence be believed, appellant knew perfectly well what he was about: the Polish agents were demanding classified (i.e., valuable and secret) information, and he tried to satisfy

their demands. He cannot now claim that the Government is required to prove that the documents he gave were in fact properly classified. The factual determination required for purposes of Section 783(b) is whether the information has been classified and whether the employee knew or had reason to know that it was classified. Neither the employee nor the jury is permitted to ignore the classification given under Presidential authority." (emphasis added)

E.O. 10501 APPLIES ONLY TO HEADS OF EXEC. AGENCIES NOT EVEN TO EXEC. BRANCH EMPLOY

c. Executive Orders have the force and effect of law. THEY, THEMSELVES, CANNOT HAVE EFFECT ON A PERSON TO WHOM THEY DO NOT APPLY.

See Greene v. McElroy, 360 U.S. 474 (1959); Farkas v. Texas Instrument, Inc., 37 F.2d 629 (5th Cir. 1967); United States v. Boria, 191 F.Supp. 563 (D. Guam, 1961); United States v. Angcog, 190 F.Supp. 696 (D. Guam, 1961).

2. Conspiracy to Commit Offenses Against the United States.

a. As noted in Nye & Nissen v. United States, 168 F.2d 846, 850 (9th Cir. 1948), aff'd. 336 U.S. 613 (1949):

> "A single conspiracy may embrace several related conspiracies. And the rule is settled that a single conspiracy may have as its object two or more wrongful acts, and that an indictment charging such a conspiracy is not duplicitous for that reason. Braverman v. United States, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23."

As stated in United States v. Kissel, 218 U.S. 601, 607 (1910):

"When the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one."

b. The elements of the crime of conspiracy may be established by circumstantial evidence. Davenport v. United States, 260 F.2d 591 (9th Cir. 1958); Jordan v. United States, 370 F.2d 126 (10th Cir. 1966), cert. den. 386 U.S. 1033; Johnson v. United States, 380 F.2d 810 (10th Cir. 1967); United States v. Chambers, 382 F.2d 910 (6th Cir. 1967).

A conspiracy may be shown to exist among several persons without the necessity of showing that each person had actual knowledge of the identity and functions of all his alleged co-conspirators. Daily v. United States, 282 F.2d 818 (9th Cir. 1960); Marino v. United States, 91 F.2d 691 (9th Cir. 1937); Wood v. United States, 283 F.2d 4 (5th Cir. 1960); Nassif v. United States, 370 F.2d 147 (8th Cir. 1966); United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968).

That a defendant was aware that he was not alone in plotting with common conspirators to violate the law is sufficient to raise the necessary inference that he had joined in an overall agreement. Blumenthal v. United States, 332 U.S. 539 (1947); Daily v. United States, supra.

Once the existence of a conspiracy is shown, slight evidence is all that is required to connect a defendant with the conspiracy. Diaz-Rozendo v. United States, 357 F.2d 124 (9th Cir. 1966), cert. den. 385 U.S. 856; Fox v. United States, 381 F.2d 125 (9th Cir.

1967); United States v. Chambers, 382 F.2d 910 (6th Cir. 1967); Cave v. United States, 390 F.2d 58 (8th Cir. 1968).

c. Declarations of one conspirator made during the period of the conspiracy may be used against another conspirator who was not present at the time of the declaration. This is a standard exception to the hearsay rule, based upon the theory that the declarant is an agent of the other conspirator. This, of course, presupposes independent evidence that the conspiracy in fact existed. Lutwak v. United States, 344 U.S. 604 (1953); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

The order of proof of such declarations is within the discretion of the court. The court may properly admit them with the admonition that the testimony will be stricken should the conspiracy not be shown by independent evidence. The Ninth Circuit so held in Enriquez v. United States, 314 F.2d 703 (1963), and pointed out, at page 706 that:

> " . . . The trial judge's rulings, of course, were perfectly proper, as we pointed out in our previous opinion, due to the large discretion permitted the trial court in permitting proof of an alleged conspiracy, and the order of proof of its necessary parts."

3. General Principles Re Conspiracy.

a. A conspiracy is complete upon the forming of the criminal agreement and the performance of at least one overt act in furtherance thereof.

Pinkerton v. United States, 151 F.2d 499 (5th Cir. 1945), aff'd. 328 U.S. 640;

Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969);

Romontio v. United States, 400 F.2d 618 (10th Cir. 1968);

Miller v. United States, 382 F.2d 583 (9th Cir. 1967);

Jordan v. United States, 370 F.2d 126 (10th Cir. 1966).

b. The state of mind (intent) required to render an agreement and furthering act an unlawful conspiracy is knowledge of the agreement's unlawful object.

United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970);

United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970);

Doty v. United States, 416 F.2d 887 (10th Cir. 1969);

United States v. Fellabaum, 408 F.2d 220 (7th Cir. 1969);

Jacobs v. United States, 395 F.2d 469 (8th Cir. 1968);

Miller v. United States, 382 F.2d 583 (9th Cir. 1967).

c. Evidence showing similar previous unlawful activity is admissible upon the questions of intent, purpose and design.

Nye & Nissen v. United States, 336 U.S. 613 (1949);

Heike v. United States, 227 U.S. 131 (1913);

Williamson v. United States, 207 U.S. 425 (1908);

United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965);

Koolish v. United States, 340 F.2d 513 (8th Cir. 1965).

B. GOVERNMENT PROPERTY OFFENSES

1. Government Property.

Under Executive Order 10501, documents bearing a security classification are within the exclusive ownership or control of the Government. Both the documents and their content are the property of the United States and remain its property until they are declassified and released by the Government. The content of such classified documents is itself Government property quite apart from the Government's ownership of the sheets of paper on

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FALSE. MANY PRIVATELY-OWNED DOCUMENTS, WITH ONLY PRIVATELY OWNED INFO ARE GIVEN SECURITY CLASSIFICATIONS.

NOT BECAUSE OF "CLASSIFICATION."

THIS WOULD HAVE TO BE PROVED.

which it is recorded. See United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971); United States v. Bottone, 365 F.2d 389 (2d Cir. 1966), cert. den. 385 U.S. 974 (1966).

2. Value.

The value of the stolen property is an element of the offense and proof of value must be introduced at trial. United States v. Wilson, 284 F.2d 407, 408 (4th Cir. 1960); Cartwright v. United States, 146 F.2d 133, 135 (5th Cir. 1944). Section 641 defines value as "face, par, or market value, or cost price, either wholesale or retail, whichever is greater." The face value can be virtually nothing, as in Keller v. United States, 168 Fed. 697 (7th Cir. 1909), where the stolen property consisted of six blank checks worth one cent each. The market value is not limited to the legitimate resale price of the property but may also be the price fences might pay on the "thieves' market." Churder v. United States, 387 F.2d 825 (8th Cir. 1968); Jalbert v. United States, 375 F.2d 125 (5th Cir. 1967); United States v. Ciongoli, 358 F.2d 439 (3rd Cir. 1966). The "whichever is greater" rule is applicable regardless of the disparity between the retail cost price and the market value. O'Malley v. United States, 227 F.2d 332, 336 (1st Cir. 1955), cert. denied 350 U.S. 966 (1956). In Falks v. United States, 283 F.2d 259 (9th Cir. 1960), cert. denied 365 U.S. 812 (1961), the court upheld a felony conviction based on the theft of eighty gyro horizon indicators with a cost price of $205 each but a scrap value of only $.76 each. Finally, the prosecution does not have to prove the exact or approximate value of the solen property but merely has to show that it is in excess of $100. Jalbert, supra, at 126.

ASIDE FROM SECURITY, HOW CAN $100.00 BE PROVED WHEN THE G.P.O. EDITION IS ONLY ABOUT $4?.00 ?

3. Specific Offenses.

a. Embezzles, steals, or knowingly converts.

At common law, offenses involving the loss of property were categorized on the basis of the nature of the "taking," the intent of the owner and the intent of the defendant. These distinctions were difficult to prove. Section 641 eliminates many of these problems: first, by permitting an indictment to set forth all the above offenses in the conjunctive; and secondly, by attempting to reach all possible offenses involving the loss or misuse of Government property:

> "It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances."

Morissette v. United States, 342 U.S. 246, 271 (1952).

As to the offenses included under Section 641, embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted, and into whose hands it has lawfully come. It differs from larceny in that the original taking of the property was lawful, or with the consent of the owners, while in larceny the felonious intent musthave existed at the time of the "taking." Moore v. United States, 160 U.S. 268 (1895).

The definition of stealing, however, is not as precise: "Stealing, having no common law definition to restrict its meaning

as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth attributed to the word purloin." Crabb v. Zerbat, 99 F.2d 562, 565 (5th Cir. 1938).

Any wrongful taking of Government property comes within §641 and an intention to deprive the United States of the property permanently is not required. Courts have interpreted the word "stolen" in the Dyer Act, 18 U.S.C. §2312, as extending to temporary misappropriation.

United States v. Turley, 352 U.S. 407 (1957);

Berard v. United States, 309 F.2d 260 (9th Cir. 1963);

Jones v. United States, 378 F.2d 340 (9th Cir. 1967).

Knowing conversion completes the picture of Section 641 by covering every other situation in which an individual might obtain "wrongful advantages" from Government property:

> "Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to take away from one in lawful possession without right with the intention to keep wrongfully.' . . . Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner as to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing

abuses and unauthorized use of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions." Morissette, supra, at 271, 272.

b. Receives, conceals or retains.

None of these terms are words of art and they should be given their usual common sense meaning. These terms were intended to be read broadly in order to facilitate the application of criminal sanctions to a variety of situations in which criminal culpability exists.

To be convicted of "receiving" stolen property it need only be shown that the defendant obtained possession of or some measure of control over the property or that the defendant aided and abetted another who actually received the goods. United States v. Lefkowitz, 284 F.2d 310 (2d Cir. 1960).

To be convicted of "concealing," it must be shown that the defendant took some affirmative action as regards the stolen property which was likely to or intended to prevent the discovery or return of the stolen property. Furthermore, an individual can be convicted of concealing stolen property even though the individual never had possession of the goods if it can be shown that the individual aided and abetted in the concealment of the goods. Corey v. United States, 305 F.2d 232 (9th Cir. 1962), cert. denied, 371 U.S. 956 (1963).

Finally, the word "retains" was included in this phrase so as to make possible the application of criminal sanctions to those situations in which the intent at the time of the receipt of

the property was innocent or in which the individual's knowledge as to the stolen character of the property cannot be proven at the time he obtained possession. In these situations, therefore, a conviction under Section 641 is still possible if it can be shown that at some later time, after the individual had obtained possession of the stolen property, he acquired knowledge that the property was stolen and yet continued to retain possession of the property. Lewis v. Hudspeth, 103 F.2d 23 (10th Cir. 1939).

A receiver need only know that the property is stolen; and need not know that it is Government property.

United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961);
Schaffer v. United States, 221 F.2d 17, 23 (5th Cir. 1959);
Mora v. United States, 190 F.2d 749, 751 (5th Cir. 1951);
Adolfson v. United States, 159 F.2d 883, 886 (9th Cir. 1947), cert. denied 331 U.S. 818 (1947);
Lewis v. Hudspeth, 103 F.2d 23, 24 (10th Cir. 1939);
Gargotta v. United States, 77 F.2d 977, 981-83 (8th Cir.1935).

In Waller v. United States, 177 F.2d 171 (C.A. 9, 1949), the defendant was convicted under 15 U.S.C. 714 m(c) for stealing Commodity Credit Corporation potatos. The Court said:

> "That the wrongdoer, conscious of his wrong, entertains a mistaken idea as to the ownership of property he appropriates does not dissipate the criminality of his conduct . . . the kernel of the crime is the knowledge that the act is wrongful, and we have seen that Waller knew his act was wrong. Although he claims it as such, it is no defense that he acted upon the assumption that he was misappropriating property belonging to his friend." supra at 175.

The legislative history of Section 641 and its predecessor is also of some help. Prior to the 1948 revision of the criminal code, the receiving paragraph described the scienter as "knowing the same to have been so embezzled, stolen or purloined . . ." In 1948 the word so was stricken to prevent any implication that knowledge of Government ownership was required.

c. Conveys without authority.

The word "convey" used in the statute commonly means to transport, transmit, communicate or transfer from one person to another. See United States v. Sheldon, 2 Wheat (15 U.S.) 119-120 (1817); Chicago, R.I. & P. Ry. Co. v. Petroleum Refining Co., 39 F.2d 629, 630-31 (E.D. Ky. 1930).

Under Executive Order 10501 and its implementing regulations, documents bearing a Government security classification may lawfully be disseminated only to persons possessing an appropriate security clearance and having official duties requiring possession of the documents. Any dissemination or conveyance of such documents to other persons is "without authority." See Executive Order 10501 as amended, Section 7.

C. NATIONAL DEFENSE DOCUMENT OFFENSES.

1. "Relating to National Defense."

In Gorin v. United States, 312 U.S. 19, 28 (1941), the Supreme Court said:

> "National defense, the Government maintains, is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.

FALSE: THIS IS NOT IN E.O. 10501 (SEE SEC. 7).

WITHOUT WHOSE AUTHORITY? ELLSBERG'S AUTHORITY WAS LAWFUL.

THIS RAISES THE ACTIVE DEFENSE FACTOR. IT DOES NOT EXIST IN THE VIET NAM HISTORY.

We agree that the words 'national defense' in the Espionage Act carry that meaning."

The materials involved in the Gorin case were Naval Intelligence reports which were described in Gorin v. United States, 111 F.2d 712, 716 (9th Cir. 1940), as follows:

"None of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies or aircraft or anything pertaining thereto.

* * *

Most of them, on their face, appear innocuous, there being no way to connect them with other material which the Naval Intelligence may have, so that the importance of the reports does not appear.

"As illustrative of the information contained in the reports, we quote the report to Corin made by Salich, found in Gorin's suit by the cleaning establishment's salesman:

'George Ohashi, of San Diego, is reported to have made a statement at a JACL meeting that he was not a fascist. Couple other members, Paul Nakadate and George Suzuki took esception to this remark and accused George Ohashi of being a communist and subsequently beat him up.

'Ohashi and his wife own a beauty shop in San Diego which was found burglarized one day and the place searched.

* * *

'Dr. M. M. Nakadate is dentis and is brother of Paul Nakadate.

'Their father is Y. Nakadate who lives in San Diego and who is listed in our cards as "radical--pro-Japanese." Dr. N. M. Nakadate is borne in 1910; is member of United States Naval Reserve in dental corps and in 1935 did some training duty on board the USS Dorsey which is a destroyer. After completion of his sea duty he was attached to aviation unit of USNR, but because of his Japanese descent, it is evident, he is not being encouraged to continue his career with USNR.

'Bert Simmons a civilian employee on North Island, San Diego, which island houses Naval aviation. He was reported as a communist.

'The report, however, comes from a private watchman employed by Nick Harris Private Patrol. This watchman holds a dishonorable discharge from the Navy and it is believed that he made the report to ingratiate himself with the Navy. Report turned over to San Diego for further action'."

The defendants claimed that because of their innocuous character, the reports could not relate to the national defense. The Court of Appeals rejected this claim and said:

"It is urged that the Naval Intelligence reports show on their face that they do not relate to the national defense. We think the contention cannot be sustained." [p. 721]

The Court of Appeals also approved the trial court's jury instruction which stated:

"that it was not required * * * that the documents or information alleged to have been taken necessarily injure the United

States or benefit any foreign nation. The document need not in fact be vitally important or actually injurious. The document or information must be, however, connected with or related to the national defense." [p. 717]

The Supreme Court affirmed the Court of Appeals and said of the reports:

"As they gave a detailed picture of the counter-espionage work of the Naval Intelligence, drawn from its own files, they must be considered as dealing with activities of the military forces. A foreign government in possession of this information would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage. It could use the reports to advise the state of the persons involved of the surveillance exercised by the United States over the movements of these foreign citizens. The reports, in short, are a part of this nation's plan for armed defense. The part relating to espionage and counter-espionage cannot be viewed as separated from the whole." [p. 29]

ACTIVE

THIS MUST BE ACTIVE DEFENSE OF U.S. NOT S.E. VIETNAM.

Many factors may be considered by the jury in assessing the existence of a relationship to the national defense. The Court of Appeals in United States v. Soblen, 301 F.2d 236, 239 (2d Cir. 1962), affirmed the trial court's jury instruction which stated:

"Whether or not the . . . documents . . . concerned regarded or was connected with the national defense is a question of fact solely for the determination of . . . the jury, taking into consideration all the circumstances of the alleged crime and

considering the alleged source, origin, character and utility of the . . . documents . . . You may also consider the testimony that [they] . . . were classified information." (emphasis added)

Based upon the foregoing, the following propositions are well established:

1. The term "national defense" is a generic concept of broad connotations relating to the military establishment, and the related activities of national preparedness. It embraces those military, diplomatic and all other matters directly and reasonably connected with the defense of our nation. PER GORIN, IT MUST BE IN PREPARATION FOR DEFENSE.

2. In order for documents to relate to the national defense, it is not necessary that they be vitally important, or that their disclosure could or would be injurious to the United States.

3. Among factors to be considered in determining the national defense character of documents are their content, sources, origins, character, utility and classification. ← MAY BE CONSIDERED, NOT "TO BE CONSIDERED."

It has been claimed that information which has been made public does not "relate to the national defense" based upon the case of United States v. Heine, 151 F.2d 813 (2d Cir. 1945). Actually, Heine established no new principle of law, but merely attempted to give effect to certain dicta in United States v. Gorin, 111 F.2d 712 (9th Cir. 1940), aff'd. 312 U.S. 19 (1941). In Gorin, the defendants attempted to show that some of the material contained in Naval Intelligence reports also appeared in a public magazine. The Court of Appeals said:

> "It is also asserted that the exclusion of the Ken Magazine article was error. It is said that such article discloses that the information conveyed to Gorin was well known to the public and not confidential matters. While a serious question

might arise in a case where the only information divulged was such as could be found in newspapers or periodicals available to the public, such question does not arise in this case, because the article in the periodical does not, and does not purport to relate all information contained in the reports in question. Assuming, without so deciding, that it was error to exclude the article insofar as it had a bearing on the same information contained in some of the reports, the record affirmatively discloses that the error was not prejudicial because the information in the other reports is not contained in the article." (p. 722) [emphasis added]

The Supreme Court in Gorin affirmed the Court of Appeals and stated that "The evil which the statute punishes is the obtaining or furnishing of this guarded information . . .." (p. 30) The Court, however, indicated that the question of confidentiality bore on the issue of intent rather than relation to the national defense. The Court said:

"Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." (p. 28)

Both Heine and Gorin involved statutes which required proof that information was communicated "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation . . .." No such intent is required in the present case.

SINCE WHEN? X

IF THIS WERE TRUE, THE PROSECUTION WOULD NOT BE CITING GORIN ET AL IN A SLANTED WAY.

In Heine, the defendant had transmitted reports about the United States aviation industry. He took all of the information in his reports from public sources. The Court said:

> "The information which Heine collected was from various sources: ordinary magazines, books and newspapers; technical catalogues, handbooks and journals; correspondence with airplane manufacturers; consultation with one, Aldrich, who was already familiar with the industry; talks with one or two employees in airplane factories; exhibits, and talks with attendants, at the World's Fair in New York in the summer of 1940. * * * All of this information came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it;" (p. 815) [emphasis added]

Heine did not hold that the statute applied only to materials which were secret. The Court said:

> "At least the Judiciary Committee of the House supposed that the act was directed at 'secrets.' It is not necessary for us to go so far; and in any event 'secrets' is an equivocal word whose definition might prove treacherous. It is enough in the case at bar to hold, as we do, that whatever it was lawful to broadcast throughout the country it was lawful to send abroad;" (p. 816)

Heine stands for the proposition that information taken from public sources and which was not guarded by governmental authority is not covered by the statute. The Court said:

> "[N]o public authorities, naval, military or other, had ordered, or indeed suggested, that the manufacturers of airplanes--even including those

made for the services--should withhold any facts which they were personally willing to give out.

* * *

"The services must be trusted to determine what information may be broadcast without prejudice to the 'national defense,' and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter." (pp. 815, 816)

The Heine decision pointed out that it was merely following Gorin. The Court remarked:

"As declared in Gorin v. United States, 312 U.S. 19, 28, 61 S.Ct. 429, 85 L.Ed. 488, and as the judge himself charged, it is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public;

* * *

"Gorin v. United States, supra (312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488), contains nothing to the contrary of what we are holding. It is true that the court (312 U.S. 38, 61 S.Ct. 434) there accepted the following definition of the phrase, 'relating to the national defense' taken from the prosecution's brief: 'a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' The words, 'related activities of national preparedness,' do indeed create a penumbra of some uncertainty; but it cannot comprise such information as is

here in question, as appears from what immediately preceded the language we have quoted: 'Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." (pp. 816, 817)

The Heine case in no way indicates that unofficial disclosures or "leaks" remove documents from the "national defense" category. If that were so, anyone with access to guarded documents would have the power to destroy their protection. A treacherous possessor of a guarded document could anonymously mail a copy of it to an appropriate newspaper or columnist, and thereafter be free to do anything he chose with it. It should also be noted that there is a difference in the reliability and value of "leaked" information and official disclosures. This is recognized by Department of Defense Instruction 5210.47 (Dec. 31, 1964), which provides that "appearance in the public domain . . . of information currently classified . . . does not preclude . . . continued classification . . .." If the occurrence of a "leak" destroyed a document's legal protection, anyone with access to it could sell it to those interested in ascertaining the truth or falsity of the leaked information. Both the seller and purchaser would be exempt from the law unless the document failed to match the leaked information.

Perhaps it should also be mentioned that the Heine statement that "All of this information came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it" obviously applies only to persons who obtain information in that way from such sources. It can hardly apply to

THIS FALSIFIES E.O. 10501 POLICY

POLICY IN E.O. 10501 ON VALIDITY OF CLASSIF APPLIES.

those who claim that they could have obtained it in that fashion but chose not to take such pains and instead unlawfully secured guarded documents. See Slack v. United States, 203 F.2d 152, 156 (6th Cir. 1953), in which it was held that Heine did not apply because what the defendant had obtained "was secret information not obtained from public domain of knowledge." After all, probably most information could be obtained from lawful sources if sufficient resources are devoted to obtaining it.

The Court of Appeals for the Second Circuit has authoritatively characterized its Heine decision in United States v. Rosenberg, 195 F.2d 583, 591 (2d Cir. 1952), as follows:

> "In United States v. Heine, 2 Cir., 151 F.2d 813, we so interpreted the statute as to make it inapplicable to information which our armed forces had consented to have made public."

In United States v. Soblen, 301 F.2d 236, 239 (2d Cir. 1962), the same Court of Appeals held that:

> "The fact that the source of the information was classified as secret distinguishes this case from United States v. Heine . . .."